Supreme Court, U. S.
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No. 75-1030

In the Supreme Court of the United States

OCTOBER TERM, 1975

THEODORE WOROZBYT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner refused to testify before a grand jury on the ground that the questions were based on information obtained from an unlawful wiretap. He contends that the district court's *in camera* examination of the wire interception orders and supporting papers was inadequate to determine the facial validity of the orders in a civil contempt proceeding.

1. On August 21, 1975, petitioner was subpoenaed to testify before a grand jury of the United States District Court for the Northern District of Georgia that was investigating illegal gambling operations. He refused to answer questions, contending *inter alia* that they were the product of unlawful electronic surveillance (August 21, 1975 GJ Tr. 5-8). The government conceded that the questions propounded to petitioner were derived from electronic surveillance, 18 U.S.C. 3504, but stated that the surveillance had been lawfully conducted pursuant to two court orders.

The district court declined petitioner's suggestion to hold an evidentiary hearing on his claim that the wire interception orders were facially invalid, but conducted an *in camera* inspection of the orders, applications, and affidavits. After review of these documents, the court concluded that the wiretap orders were valid on their face and ordered petitioner to testify (August 21, 1975 GJ Tr. 5; August 27, 1975 11:30 a.m. GJ Tr. 6; August 27, 1975 12:00 noon Tr. 6-8). When petitioner again refused to answer any questions before the grand jury, he was held in civil contempt, pursuant to 28 U.S.C. 1826(a), and was ordered confined for the life of the grand jury (nine months) or until such earlier time as he purged himself of the contempt (August 27, 1975 2:00 p.m. GJ Tr. 4-5; Gov. App. 45).[1] The court of appeals affirmed (Pet. App. 1a-4a; 522 F.2d 196).

2. The petition for a writ of certiorari in this civil case was filed out of time. The judgment of the court of appeals was entered on October 20, 1975. The time for filing a petition for a writ of certiorari was not extended and, accordingly, the period provided by 28 U.S.C. 2101(c) and Rule 34(1), Sup. Ct. R., expired on Monday, January 19, 1976. Since the petition was filed on January 20, 1976, this Court lacks jurisdiction to entertain it. *Department of Banking* v. *Pink*, 317 U.S. 264; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399.[2]

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[1]"Gov. App." refers to the appendix filed with the government's brief in the court of appeals.

[2]The record indicates that petitioner filed an out-of-time motion for rehearing *en banc* on November 12, 1975, which the court of appeals denied on December 17, 1975. A party's suggestion of rehearing *en banc* does not "affect the finality of the judgment of the court of appeals * * * ." Rule 35(c), Fed. R. App. P. Thus, the date of the final judgment of the court of appeals remains October 20, 1975. We have been advised by the clerk of the court of appeals that petitioner did not file a petition for rehearing under Rule 40(a), Fed. R. App. P.

3. In any event, there is no reason for further review. Petitioner's sole contention is that the decision below conflicts with *In re Lochiatto*, 497 F.2d 803 (C.A. 1). The First Circuit held in *Lochiatto* that, at least in the absence of government objection to disclosure on the ground of secrecy, a grand jury witness who refuses to testify because of illegal electronic surveillance should be permitted to examine the wiretap order, application, and supporting affidavits. That ruling, however, was expressly limited to instances in which the witness based his refusal to testify on the assertion that "the communication was unlawfully intercepted," in violation of 18 U.S.C. 2518(10)(a)(i), or that "the interception was not made in conformity with the order of authorization or approval," in violation of 18 U.S.C. 2518(10)(a)(iii). 497 F.2d at 807-808.

When the witness' claim, as in the present case, was that "the order of authorization * * * under which [the communication] was intercepted is insufficient on its face," in violation of 18 U.S.C. 2518(10)(a)(ii), the First Circuit is in full agreement with the other courts of appeals[3] that "facial viewing by the court [is] sufficient to demonstrate facial validity or invalidity," and that an evidentiary examination by the witness is not required. *In re Lochiatto, supra*, 497 F.2d at 808. See also *In re Mintzer*, 511 F.2d 471 (C.A. 1); *In re Dunn*, 507 F.2d 195 (C.A. 1). Thus, even under *Lochiatto* petitioner would have been entitled only to an *in camera* inspection by the court.[4]

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[3]See also *Droback* v. *United States*, 509 F.2d 625 (C.A. 9), certiorari denied, 421 U.S. 964; *In re Persico*, 491 F.2d 1156 (C.A. 2), certiorari denied, 419 U.S. 924.

[4]It also appears that this case is moot. Petitioner, who had been free on bail pending appeal, was not incarcerated after the court of appeals' ruling because of his representations to the district court that he would

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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agree to appear before the grand jury and would not assert the electronic surveillance as a basis for his refusal to testify. We have been informed that it is the intention of the Department of Justice to summon petitioner before the grand jury in the near future.